

CHAPTER 3 PRELIMINARY PROJECT PLANNING

SUB-CHAPTER 3.3 SELECTING PERFORMANCE SECURITY

3.3.1 GENERAL *SC Code Ann Reg. 19-445.2145(4)*

At the same time an Agency determines which project delivery method to use on a project, it must also determine the performance security requirements for the project and set these requirements forth in its written determination of appropriate project delivery method.

Performance security is typically provided in the form of a bond but may occasionally take the form of a cashier's check. Performance security guarantees that the contractor will perform the work of the contract and guarantees that the contractor will pay his subcontractors, suppliers, laborers, etc. In the case of bonds this security consists of a performance bond guaranteeing the performance obligations toward the owner and a payment bond guaranteeing the contractor's payment obligations toward subcontractors, suppliers, laborers, etc.

3.3.2 SELECTING PERFORMANCE AND PAYMENT SECURITY – *SC Code Ann §§ 11-35-3030(2); 11-35-3037; and 29-6-250 and SC Code Ann Reg. 19-445.2145(C)(2)*

Both performance and payment security is required in the amount of 100% of the contract price less the cost of operation, maintenance, and finance. Security may be in the form of a certified cashier's check or surety bonds. The Agency may also require the contractor to provide operations and maintenance period security in the form of surety bonds and letters of credit covering cost of preventing infrastructure service interruptions for a period up to 12 months and the Agency may require written guarantees from a parent corporation securing re-procurement cost in the event of operations period default.

DELIVERY METHOD	CONTRACTOR	SECURITY REQUIRED	OPTIONAL SECURITY (Only required when Agency Chooses this Option)
Design-Bid-Build	Architect Engineer	None	None
	General Contractor, contract ≤ \$50,000	None	Performance Security ≤ 100% of contract price & Payment Security ≤ 100% of contract price
	General Contractor, contract > \$50,000	Performance Security = 100% of contract price & Payment Security = 100% of contract price	N/A
Construction Management at Risk	Architect Engineer	None	None
	Construction Manager at Risk	Performance Security = 100% of construction phase Guaranteed Maximum Price (GMP) & Payment Security = 100% of construction phase GMP	May require security for pre-construction phase work
Design-Build	Design-Builder	Performance Security = 100% of contract price & Payment Security = 100% of contract price (Contract Price includes design costs)	N/A
Design-Build-Operate Maintain	Design-Build-Operator	Performance Security = 100% of contract price less	Operations Phase performance bond; letter of credit to cover cost of

		cost of operations and maintenance & Payment Security = 100% of contract price less cost of operations and maintenance	preventing infrastructure service interruptions for a period up to 12 months; and/or parent corporation written guarantee securing re-procurement cost in contractor defaults during operations period.
Design-Build-Finance-Operate Maintain	Design-Build-Operator	Performance Security Performance Security = 100% of contract price less cost of financing, operations, and maintenance & Payment Security = 100% of contract price less cost of financing, operations, and maintenance	Operations Phase performance bond; letter of credit to cover cost of preventing infrastructure service interruptions for a period up to 12 months; and/or parent corporation written guarantee securing re-procurement cost in contractor defaults during operations period.

3.3.3 FORM OF REQUIRED PERFORMANCE AND PAYMENT SECURITY – SC Code Ann Reg. 19-445.2145(C)(2)

PERFORMANCE SECURITY: When the Procurement Code requires performance security, the contractor must provide a certified cashier's check or surety bond in an amount equal to 100% of the contract price less finance, operations, and maintenance costs, if any. A performance bond must be issued by surety company 1) licensed in South Carolina; 2) having a minimum Best Rating of performance "A" as stated in the most current publication of "Best Key Rating Guide, Property Liability" (<http://www3.ambest.com/ratings/default.asp>);¹ and 3) having a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. If the contractor provides a performance bond, the Surety must write the bond on OSE form SE-355 Performance Bond.

PAYMENT SECURITY: When the Procurement Code requires payment security, the contractor must provide a certified cashier's check or surety bond in an amount equal to 100% of the contract price less finance, operations, and maintenance costs, if any. A payment bond must be issued by surety company 1) licensed in South Carolina; 2) having a minimum Best Rating of performance "A" as stated in the most current publication of "Best Key Rating Guide, Property Liability" (<http://www3.ambest.com/ratings/default.asp>); and 3) having a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. If the contractor provides a payment bond, the Surety must write the bond on OSE form SE-357 Labor and Material Payment Bond.

3.3.4 FORM OF OPTIONAL PERFORMANCE AND PAYMENT SECURITY – SC Code Ann Reg. 19-445.2145(C)(2) and 19-445.2145(M)

CONTRACTS OF \$50,000 OR LESS - SC Code Ann Reg. 19-445.2145(C)(2): When security is required on construction of \$50,000 or less, security shall be in the form set forth in 3.3.3 above. However, the agency may, upon written justification and with the approval of the Office of the State Engineer, allow the use of a "B+" " " rated bond.

OPERATIONS PHASE SECURITY - SC Code Ann Reg. 19-445.2145(M):

¹ For Best Ratings go to <http://www3.ambest.com/ratings/default.asp>. On this page, the Agency will find place to enter a company's name to find its Best's ratings (at the time of this writing on the right hand side of the page under Member Center). The Agency must register with the site to conduct a search. There is no cost to register.

A. **PERFORMANCE BOND:** The Agency may choose to require an operations period performance bond securing the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract. An operations period performance bond must be in the amount of 100% of that portion of the contract price that includes the cost of operation and maintenance services during the period covered by the bond. When contract period for operation and maintenance will be longer than 5 years, an operations period performance bond of five years' duration, is acceptable provided that such bond is renewable by the contractor every five (5) years during the contract, and provided further, that the Agency must require the contractor to make a firm contractual commitment to maintain such bond in full force and effect throughout the contract term. A operations period performance bond must be issued by surety company 1) licensed in South Carolina; 2) having a minimum Best Rating of performance "A" as stated in the most current publication of "Best Key Rating Guide, Property Liability" (<http://www3.ambest.com/ratings/default.asp>); and 3) having a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance.

B. **LETTERS OF CREDIT TO COVER INTERRUPTIONS IN OPERATION:** An Agency may choose to require an irrevocable letter of credit with a banking institution in this State that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount sufficient to cover 100% of the cost of performing such operation and maintenance services during the first 12 months of the contract with annual adjustments every year thereafter for the term of the contract.

C. **GUARANTEES:** An Agency may choose to require a written guarantee that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the contract period.